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92-8994

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFRED ARTHUR SANDOVAL,

PETITIONER,

v.

STATE OF CALIFORNIA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE*, CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION, IN SUPPORT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Was petitioner deprived of due process and a fair jury trial by the use of a constitutionally defective reasonable doubt instruction which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation?

TABLE OF CONTENTS

		Pages
QUESTION PRESENTED		i
TABLE OF CONTENTS		ii
TABLE OF AUTHORITIES		iii
MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE STATE OF CALIFORNIA		1
INTEREST OF *AMICUS CURIAE*		2
SUMMARY OF ARGUMENT		5
INTRODUCTION		6
I	CONSIDERED AS A WHOLE, IT IS UNLIKELY THAT CALJIC INSTRUCTION 2.90 WOULD MISLEAD A JURY	6
II	EVEN CONSIDERED IN ISOLATION, THE USE OF THE WORD "MORAL" IN CALJIC INSTRUCTION 2.90 DOES NOT DILUTE THE DUE PROCESS RIGHT STANDARD OF PROOF "BEYOND A REASONABLE DOUBT"	9
III	IF THE CHARGE TO THE JURY IS CONSIDERED AS A WHOLE, IT IS CLEAR THAT NO REASONABLE JURY WOULD LIKELY BE MISLED	12
CONCLUSION		16

TABLE OF AUTHORITIES

CASES	Pages
Boyde v. California, __ U.S. __, 110 S.Ct. 1190, 1198 (1990)	5, 7
Bruce v. State, 616 A.2d 392, 403 (Md. 1992)	11
Cage v. Louisiana, __ U.S. __, 111 S.Ct. 328, 329 (1990)	7
Commonwealth v. Rankin, 311 A.2d 660, 661 fn.1 (Pa. Super. 1973)	10
Crocker v. State, 573 S.W.2d 190, 207. (Tex.Crim.App. 1978)	11
Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)	12
Dominick v. State, 433 S.E.2d 405 (Ga.App. 1993)	11
Erving v. State, 427 So.2d 701, 704-05 (Miss. 1983)	10
Evans v. State 499 A.2d 1261, 1287 (Md. 1985)	11
Hamling v. United States, 418 U.S. 87, 107-08 (1974)	7
Holland v. United States, 348 U.S. 121, 138-39 (1954)	11

In re Winship, 397 U.S. 362 (1970)	6, 8
Jackson v. Virginia, 443 U.S. 307 (1979)	6, 10
Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990)	10
Moore v. State, 318 S.E.2d 172, 173 (Ga.App. 1984)	10
People v. Hall, 396 P.2d 700 (Cal. 1964)	6, 8
People v. Johnson, 842 P.2d 1, 46 fn.1 (Cal. 1992)	11
People v. Rossman 463 N.Y.S.2d 891, 893 (N.Y.App.Div. 1983)	10
People v. Sammons 478 N.W.2d 901, 912 (Mich.App. 1991)	11
Rhinehart v. State, 299 S.W. 755, 757 (Ark. 1927)	10
Smith v. State, 394 So.2d 882, 884-85 (Miss. 1981)	11
State v. Butler, 543 A.2d 270, 278 (Conn. 1988)	11
State v. Desrosiers, 559 A.2d 641, 645 (R.I. 1989)	10

State v. Galvan,
368 N.W.2d 400, 403 (Minn.App. 1985) 11

State v. Oliver,
354 S.E.2d 527, 541 (N.C.App. 1987) 11

State v. Payne,
289 N.W.2d 173, 179 (Neb. 1980) 10

State v. Ramey,
60 S.E.2d 66, 72 (S.C. 1950) 10

State v. Reid,
267 P.2d 986, 990 (Mont. 1954) 10

State v. Udstuen,
345 N.W.2d 766, 768 (Minn. 1984) 11

State v. Watson,
240 S.E.2d 440, 446 (N.C. 1978) 10

Sullivan v. Louisiana __ U.S. __,
113 S.Ct. 2078 (1993) 3, 7

United States v. Park,
421 U.S. 658 (1975) 12

United States v. Smaldone,
485 F.2d 1333, 1348 (10th Cir. 1973) 10

United States v. Tobin,
576 F.2d 687, 694 (5th Cir. 1978) 10

Wintjen v. State 398 A.2d 780,
781 (Del. 1979) 11

JURY INSTRUCTIONS

California Jury Instructions,
Criminal

Section 1.00 13, 14

Section 1.01 12

Section 1.02 14

Section 2.09 14

Section 2.20 8, 14

Section 2.21.1 8

Section 2.61 15

Section 2.80 14

Section 2.91 15

Section 8.50 15

Section 8.71 15

Section 8.72 15

Section 8.80 15

Section 8.81.3 15

Section 2.00 14

Section 2.90 5-9, 12, 14

District of Columbia, Criminal Jury Instruction

Section 2.09 (3rd ed. 1978) 11

Connecticut Criminal Jury Instruction

David M Borton and Leonard Orland, Criminal Jury Instructions, in 5 *Connecticut Practice* section 2.9 at 50-51 (1986 and Supp. 1993) 11

Georgia Suggested Pattern Jury Instruction

Part 2.D. (2d. ed. 1991) 11

Hawaii Standard Jury Instruction

Section 3.02 11

Maryland Criminal Jury Instruction

Section 2:02 (1991) 11

So. Dakota Pattern Jury Instructions, Criminal

Section 1-6-1 11

Tennessee Pattern Jury Instruction Criminal

Section 2.03 (3d.ed. 1992) 11

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 37.1 2

Rule 37.3 1

Rule 37.5 2

MISCELLANEOUS

Black's Law Dictionary 1827 (Oxford, 1993) 10, 12

The New Shorter Oxford English Dictionary 1827 (Oxford, 1993) 9, 10

The Oxford English Dictionary, "M," 654 (Compact Edition, 1971) 10

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MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
THE STATE OF CALIFORNIA

Pursuant to Rule 37.4, Rules of the Supreme Court of the United States, ***amicus curiae***, the Appellate Committee of the California District Attorneys' Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached ***amicus curiae*** brief in support of the State of California.

Pursuant to Rule 37.3, Rules of the Supreme Court of the United States, ***amicus*** sought consent from petitioner in this case. Petitioner's counsel agreed by telephone to the Committee's request to file an ***amicus*** brief in support of respondent in the instant case, and counsel for the Committee sent a consent form to counsel for petitioner, together with a self-addressed, stamped envelope. Counsel for petitioner has failed to return the consent form and, as of the date and time this brief was submitted for printing, had not responded to repeated telephone calls from counsel for the Committee.

The California District Attorneys' Association is an association of District Attorneys who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. *See*, Rule 37.5, Rules of the Supreme Court of the United States.

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 37.5.

Amicus believes that, pursuant to Rule 37.1, Rules of the Supreme Court of the United States, the *amicus* brief offered herein brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties, and will be of considerable help to the Court. It addresses the use of the term "moral" in the context of the California "reasonable doubt" jury instruction, considers how the phrases used have been interpreted by other states and reference authorities, and examines the role that these phrases play when considered in light of the entire charge to the jury.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys' Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State of California, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter, the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case

may have profound impact upon the administration of criminal justice throughout California because it places in jeopardy every criminal conviction in the state not yet final. California's already-vastly overburdened criminal justice system tries more than 12,000 jury trials in a given year. 2 Judicial Council of California, *1993 Annual Report* p.56 (felonies), p.78 (misdemeanors) (1993). This figure includes more than 5,000 felony trials. *Id.*, at 56. Pursuant to this Court's rulings in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Sullivan v. Louisiana* __ U.S. __, 113 S.Ct. 2078 (1993), *all* of these cases not yet final on appeal may be subject to per se reversal. This would include not only all recent criminal judgments following a jury trial, but all criminal cases pending on appeal in the six districts of the California Courts of Appeal. It would also include all pending criminal appeals before the Supreme Court, among them roughly 200 death-penalty appeals currently pending before that court. Gerald F. Uelman, *How the Justices Stack Up*, Daily Journal Report, June 4, 1993 at p.10. Many, if not most of these are from 5 to 10 years old, raising serious doubt as to the practicability of retrying those cases. In addition, as is discussed at length below, the Committee is convinced that California's standard jury instruction regarding reasonable doubt is Constitutionally sound. It is for these reasons that the Com-

mittee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

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SUMMARY OF ARGUMENT

Jury instructions should be read as a whole. Jurors do not parse every phrase of an instruction in the manner that lawyers might. The relevant standard for review of an allegedly ambiguous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, __ U.S. __, 110 S.Ct. 1190, 1198 (1990). Read in the context of the instruction at issue, the terms "moral evidence" and "moral certainty" are unlikely to confuse or mislead a jury.

Even read in isolation, the uses of the word "moral" in CALJIC instruction 2.90 are unlikely to mislead. "Moral evidence" merely focusses the jury's attention on the fact that the evidence in a criminal trial is, for the most part, human evidence, involving such issues as credibility, etc., rather than the sort of evidence which is absolutely determinable. The use of "moral certainty" emphasizes to the jury that, while absolute certainty is not required, in order to return a guilty verdict the jury must come to a subjective state of "near certitude."

The entire charge to the jury is to be read as a whole. A review of the instructions read in the instant case shows that, while the terms "moral evidence" and "moral certainty" are used but once and in passing, the phrase "beyond a reasonable doubt" is used repeatedly in California's pattern jury instructions as the touchstone for the determination of guilt.

INTRODUCTION

This Court has determined the fundamental Constitutional standard of proof applicable in criminal trials to be proof "beyond a reasonable doubt." *In re Winship*, 397 U.S. 362 (1970). In that case, the Court begins its analysis by tracing the use of the phrase, "beyond a reasonable doubt," from the late eighteenth century to the present. *Id.*, 397 U.S. at 361-63. The Court went on to conclude that, in light of the great interest of defendants in not being wrongfully found guilty, the "beyond a reasonable doubt" standard was required by the Due Process clause as "a prime instrument for reducing the risk of convictions resting on factual error." *Id.*, 397 U.S. at 363-64.

Almost a decade later, in *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court described "beyond a reasonable doubt" as the applicable standard of proof because it "impress[es] upon the factfinder the need to reach a subjective state of *near certitude* of the guilt of the accused." *Id.*, at 315. This characterization of the Constitutional standard was anticipated fifteen years earlier by the California Supreme Court in *People* v. *Hall*, 396 P.2d 700 (Cal. 1964). *Id.*, at 705 ("To justify a criminal conviction, the trier of fact must be reasonably persuaded to a *near certainty*.") (Traynor, C.J., for the court). As addressed below, the California pattern jury instruction regarding "reasonable doubt" (hereinafter "CALJIC 2.90") does not reduce or dilute the standard of proof of guilt, which both this Court and the courts of California have found Constitutionally mandated.

I

CONSIDERED AS A WHOLE, IT IS UNLIKELY THAT CALJIC INSTRUCTION 2.90 WOULD MISLEAD A JURY

The fundamentally false premise underlying petitioner's basic argument is that jurors minutely analyze every word of the instructions given to them, such as a constitutional scholar might do. It is settled that "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them."

Hamling v. United States, 418 U.S. 87, 107-08 (1974); *and see*, *Cage v. Louisiana*, __ U.S. __, 111 S.Ct. 328, 329 (1990). Furthermore, this Court has recently determined that the standard for interpreting an ambiguous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, __ U.S. __, 110 S.Ct. 1190, 1198 (1990); *accord*, *Estelle v. McGuire* __ U.S. __, 112 S.Ct. 475, 482 fn.4 (1991) [disapproving the standard applied in *Cage*, *supra*].[1]

This Court explained its reasoning for laying down the rule in *Boyde*, *supra*, in part as follows:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id., at 110 S.Ct. 1198.

Furthermore, the contexts in which the phrases "moral evidence" and "moral certainty" are used in CALJIC instruction 2.90 are not such that these phrases would likely lead jurors astray. First, as to the phrase "moral evidence," it is used in parallel with "human affairs" in CALJIC instruction 2.90: "It [reasonable doubt] is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." The effect of these two phrases – "human affairs" and "moral evidence" – used together is to emphasize that, as the trier of

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1. In *Sullivan v. Louisiana*, __ U.S. __, 113 S.Ct. 2078 (1993), this Court declined to apply the standard enunciated in *Boyde* and *Estelle* on the grounds that the state had "fail[ed] to raise this issue below." *Id.*, 113 S.Ct. at 2081 fn.1. By contrast, as soon as petitioner, with his case pending before the California Supreme Court, raised the issue of the alleged unconstitutionality of the "reasonable doubt" instruction in a supplemental brief, the State of California responded by expressly raising the *Boyde/Estelle* issue. Respondent's Reply to Appellant's Supplemental Brief to the California Supreme Court, p.4.

fact, the jury will not be concerned primarily with matters – e.g., scientific or philosophical – that can be definitively resolved by experiment or measurement, or which inhabit the realm of pure reason. Rather, the jury will be concerned with the much more problematic world of human evidence, where few truths are ascertainable with absolute certainty. In its deliberations, the jury will, for example, be called upon to judge the credibility of witnesses, often relying (at least in part) upon subtle clues such as demeanor or attitude. See CALJIC 2.20 (regarding credibility of witnesses). In so doing, the jury must be alert to the possibility that a witness may intentionally not tell the truth, but they must also allow for human frailties, such as forgetfulness or innocent misrecollection. See CALJIC 2.21.1 (making this point). In sum, the parallel usage of the terms "human affairs" and "moral evidence" serves to put the jurors on notice as to the nature of the evidence they will be evaluating in their deliberations and to emphasize that absolute certainty is not to be expected in such matters. Therefore, it is unlikely that a jury would be misled by the one-time use of the phrase "moral evidence," when considered in context.

Second, as to the use of "moral certainty" in CALJIC 2.90, this term is used in conjunction with the phrase "abiding conviction." Far from lowering the standard of proof, as petitioner alleges, the sentence in which these two phrases are used serves as a counterpoint to the immediately preceding sentence, addressing "possible or imaginary doubt." That is, although the jurors cannot expect absolute certainty, neither may they return a guilty verdict if they harbor serious subjective doubt; rather, they must come to an "*abiding conviction* to a moral *certainty*." As such, the two phrases used together embody that standard of a "need to reach a state of near certitude," or "near certainty," of guilt, which both this Court and the California Supreme Court have adopted as a measure of the standard of proof required by the Due Process clause. *In re Winship*, *supra*, 397 U.S. at 364; *People* v. *Hall*, *supra*, 396 P.2d at 705.

Third, California has not sat by idly or uncritically with regard to the present "reasonable doubt" instruction. On the contrary, as recently as 1987, the state legislature requested the committee responsible for California's pattern jury instructions (hereinafter, the "CALJIC Committee") to undertake a thorough reexamination of the present instruction and of "alternatives" to

it.[2] The CALJIC Committee undertook this reexamination of the instruction from several different perspectives. It noted the lack of empirical evidence that the instruction was confusing or ambiguous for jurors. CALJIC Report on Reasonable Doubt, 14-15 (bracket added). It also surveyed judges and lawyers in California who actually observed CALJIC 2.90 in use. It found "a substantial consensus among judges and lawyers . . . that there [should] be no change in the definition of reasonable doubt." *Id.*, at 44 (bracket added). The committee then surveyed jury instructions on reasonable doubt in all of the fifty states. *Id.*, at 15-34.[3] Based upon this careful review of the advantages and disadvantages of changing California's "reasonable doubt" instruction, the committee concluded that the present instruction should be retained. *Id.*, at 7-10.

II

EVEN CONSIDERED IN ISOLATION, THE USE OF THE WORD "MORAL" IN CALJIC INSTRUCTION 2.90 DOES NOT DILUTE THE DUE PROCESS RIGHT STANDARD OF PROOF "BEYOND A REASONABLE DOUBT"

The most recent, authoritative reference dictionary of the English language, published just this year, defines "moral certainty" to mean "a degree of probability so great as to admit of *no reasonable doubt*; *a practical certainty*." *The New Shorter*

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2. Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles, Report of the Committee on Standard Jury Instructions -- Criminal of the Los Angeles Superior Court to the California Legislature on Alternatives to the Reasonable Doubt Definition (1987), *reprinted at* Daily Journal, May 22, 1987 – No. 87-10, hereinafter, "CALJIC Report on Reasonable Doubt Instruction." The study was undertaken by the Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles County (commonly referred to as the "CALJIC Committee"), which is a committee of judges and attorneys responsible for California's pattern jury instructions in criminal law. Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles, *California Jury Instructions, Criminal* ["CALJIC"] (5th ed. 1988).

3. For example, the Committee's study reflected that, as of 1987, a dozen states used the phrase, "moral certainty." *Ibid.*

Oxford English Dictionary 1827 (Oxford, 1993). Similarly, *Black's Law Dictionary* defines "moral certainty" to mean:

> That degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads. A high degree of impression of the truth of a fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case. Such signifies a probability sufficiently strong to justify action on it; a very high degree of probability, although not demonstrable, as a certainty. It has also been used as indicating a conclusion of the mind established *beyond a reasonable doubt*.

Id., 909 (5th ed. 1979).

And the *Oxford English Dictionary*, the most authoritative dictionary in the history of the English Language, defines the phrase in very similar language, as "a practical certainty resulting from moral evidence; a degree of probability so great as to admit of *no reasonable doubt*." *The Oxford English Dictionary*, "M,"654 (Compact Edition, 1971).

Many courts have expressly found the terms "moral certainty" and "moral evidence" to be synonymous. *Rhinehart v. State*, 299 S.W. 755, 757 (Ark. 1927); *State v. Desrosiers*, 559 A.2d 641, 645 (R.I. 1989); *Erving v. State*, 427 So.2d 701, 704-05 (Miss. 1983); *State v. Reid*, 267 P.2d 986, 990 (Mont. 1954); *State v. Payne*, 289 N.W.2d 173, 179 (Neb. 1980); *People* v. *Rossman* 463 N.Y.S.2d 891, 893 (N.Y.App.Div. 1983); *State v. Watson*, 240 S.E.2d 440, 446 (N.C. 1978); *Moore v. State*, 318 S.E.2d 172, 173 (Ga.App. 1984); *Commonwealth v. Rankin*, 311 A.2d 660, 661 fn.1 (Pa.Super. 1973); *State v. Ramey*, 60 S.E.2d 66, 72 (S.C. 1950).

Thus, the phrase, "moral certainty" in no way "dilutes" the burden of the state to prove a charge beyond a reasonable doubt. On the contrary, it serves to impress upon the jury the need for "near certitude" in their belief of a defendant's guilt before returning a guilty verdict. *Jackson v. Virginia*, 443 U.S., *supra*, at 315. In fact, some courts have expressed the view that "moral certainty" elevates the burden on the prosecution above "beyond a reasonable doubt." *United States v. Tobin*, 576 F.2d 687, 694 (5th Cir. 1978); *United States v. Smaldone*, 485 F.2d 1333, 1348 (10th Cir. 1973); *and see, Monk v. Zelez*, 901 F.2d 885, 890 (10th Cir. 1990). Indeed, many defendants have

appealed their cases, arguing that an instruction prescribing the "beyond a reasonable doubt" standard was not enough – that they had a *right* to have the jury instructed that they must find a defendant guilty to a "moral certainty." *E.g.*, *State v. Butler*, 543 A.2d 270, 278 (Conn. 1988); *Bruce v. State*, 616 A.2d 392, 403 (Md. 1992); *Evans v. State* 499 A.2d 1261, 1287 (Md. 1985); *People v. Sammons* 478 N.W.2d 901, 912 (Mich.App. 1991); *State v. Galvan*, 368 N.W.2d 400, 402-03 (Minn.App. 1985); *State v. Udstuen*, 345 N.W.2d 766, 768 (Minn. 1984); *Smith v. State*, 394 So.2d 882, 884-85 (Miss. 1981); *State v. Oliver*, 354 S.E.2d 527, 541 (N.C.App. 1987); *Crocker v. State*, 573 S.W.2d 190, 207 (Tex.Crim.App. 1978).

On the other hand, the phrase "moral certainty" serves to emphasize that we are dealing here in the realm of human affairs, not in a realm of abstractions. Other states emphasize this distinction in different terms. Some courts explain to the jury in the course of their "reasonable doubt" instruction that returning a guilty verdict does not require a "mathematical certainty" because in practical matters such as crime there is no such certainty. *See*, David M Bordon and Leonard Orland, *Criminal Jury Instructions*, in 5 *Connecticut Practice* §2.9 at 50-51 (1986 and Supp. 1993[4]); *Criminal Jury Instruction, District of Columbia* §2.09 (3rd ed. 1978) (*and see, Foreman v. United States*, 1993 WL 477614 at fn.2); Council of Superior Court Judges of Georgia, *Suggested Pattern Jury Instructions*, Part 2.D. (2d. ed. 1991); *Maryland Criminal Pattern Jury Instructions* 2:02 (1991); *and see, Holland v. United States*, 348 U.S. 121, 138-39 (1954). Other states emphasize that what is called for is not "absolute" certainty or freedom from "all" doubt. *See*, *Criminal Jury Instructions (Connecticut)*, *supra*, at §2.9; *Georgia Suggested Pattern Jury Instruction*, *supra*, at Part 2.D.; *Hawaii Standard Jury Instruction* No. 3.02; *South Dakota Pattern Jury Instructions, Criminal*, No. 1-6-1; *Tennessee Pattern Jury Instructions - Criminal* §2.03 (3d.ed. 1992); *see also, People v. Johnson*, 842 P.2d 1, 46 fn.1 (Cal. 1992); *Wintjen v. State* 398 A.2d 780, 781 (Del. 1979); *Dominick v. State*, 433 S.E.2d 405 (Ga.App. 1993).

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4. Petitioner incorrectly states that Connecticut has no pattern jury instructions. Petitioner's Brief on the Merits, p.A-2.

Similarly, "moral evidence" imports evidence of a practical, rather than mathematical or absolute nature. *Black's Law Dictionary* defines that phrase,

> [a]s opposed to "mathematical" or "demonstrative" evidence, this term denotes that kind of evidence which, without developing an absolute and necessary certainty, generates a high degree of probability or persuasive force. It is founded upon analogy or induction, experience of the ordinary course of nature or the sequence of events, and the testimony of men.

Id., at 909.

In sum, the employment of these terms, "moral certainty" and "moral evidence," even considered in isolation from the rest of the instruction, is unlikely to mislead a jury from its duty to apply the "beyond a reasonable doubt" standard of proof.

III

IF THE CHARGE TO THE JURY IS CONSIDERED AS A WHOLE, IT IS CLEAR THAT NO REASONABLE JURY WOULD LIKELY BE MISLED

It is the settled jurisprudence of this Court that the charge to the jury must be read as a whole. As the Court stated in *United States v. Park*, 421 U.S. 658 (1975), "`a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id.*, at 674, quoting from *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).[5] Reading the jury instructions in the instant case as a whole demonstrates that the jurors would not likely have been led astray by the passing use of the "moral evidence" and "moral certainty" in instruction 2.90.

Petitioner argues that "the term `moral certainty' . . . invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence." Petitioner's Brief on the Merits, at 25; *and see* pp.25-32 (*passim*). With regard to "moral evidence," petitioner claims that the term "connotes matters

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5. In fact, California's standard, pattern jury instructions expressly instruct jurors that they *must* consider the instructions as a whole. (CALJIC 1.01.)

relating to the ethics or morality of a particular situation, rather than the objective, verifiable facts comprising the situation." *Id.*, at 32-34. But when the "reasonable doubt" instruction is read in the context of the other instructions, it is clear that neither of these claims is justified.

The very first jury instruction generally given in criminal cases in California is CALJIC 1.00, the complete text of which is set out in the margin.[6] This pattern instruction is given in virtually all criminal jury trials, and was given in petitioner's case. Joint Appendix, at 51-52. *By its terms*, it instructs jurors that they "must not be influenced . . . by prejudice against" the defendant, and that they "must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." CALJIC 1.00. Thus, even assuming *arguendo* that "moral certainty" invites jurors to consider their "feelings" and "emotions," as petitioner contends, they have

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6. You have heard all the evidence [and the arguments of the attorneys], and now it is my duty to instruct you on the law that applies to this case.

[The law requires that I read the instructions to you.] [You will have these instructions in written form in the jury room to refer to during your deliberations.]

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence [or by stipulation. A stipulation is an agreement between attorneys regarding the facts]. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict [and any finding you are instructed to include in your verdict].

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against [him] [her]. You must not be biased against the defendant because [he] [she] has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that [he] [she] is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

already been expressly instructed that that is one thing they "must not" do. Again, with regard to the assertion that "moral evidence" invites a jury to consider improper ethical considerations, Instruction 1.00 expressly directs the jurors that they

> must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict.

CALJIC 1.00.

CALJIC instruction 2.00 goes on to define evidence and to distinguish between direct and circumstantial evidence. Many other instructions explain or direct the jury as to how to consider particular types of evidence and what factors are relevant to weighing that evidence. For example, at petitioner's trial, the jury was instructed that statements and questions by lawyers are not evidence. Joint Appendix, at 54 (CALJIC 1.02). They were instructed as to what specific factors may be used to evaluate the credibility of witnesses. Joint Appendix, at 60-61 (CALJIC 2.20). They were told that certain evidence was admitted for a limited purpose and could not be considered for any other purpose. Joint Appendix, at 58 (CALJIC 2.09). They were told how to weigh the testimony of expert witnesses. Joint Appendix, at 75 (CALJIC 2.80). The fact is that the practices and procedures which a jury must use in evaluating the evidence adduced at trial are carefully controlled and limited to evidence relevant to the determination of the defendant's guilt or innocence. Thus, there is no reasonable likelihood that one passing reference to "moral evidence" would mislead a jury from their duty.

Finally, it is fundamental to petitioner's claim that the due process requirement that the prosecution prove its case "beyond a reasonable doubt" has been reduced or diluted. But, reading the instructions as a whole shows that this is not so. "Moral evidence" and "moral certainty" are used but once, in CALJIC 2.90. The phrase, "beyond a reasonable doubt," by contrast, is used repeatedly in California's standard instructions as the touchstone for proof of guilt. Thus, the standard instruction regarding the defendant's right not to testify reads:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove ***beyond a reasonable doubt*** every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against [him] [her] on any such essential element.

CALJIC 2.61.

The standard instruction regarding eye-witness identification reads:

> The burden is on the People to prove ***beyond a reasonable doubt*** that the defendant is the person who committed the crime with which [he] [she] is charged.
>
> *If*, after considering the circumstances of the identification . . . ***you have a reasonable doubt*** whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find [him] [her] not guilty.

CALJIC 2.91.

Again, the instruction distinguishing murder (the crime charged in the instant case) from manslaughter includes the following language: "To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove ***beyond a reasonable doubt*** each of the elements of murder . . . ." CALJIC 8.50.

Each of these instructions was given at petitioner's trial. Joint Appendix, at 72, 79 and 95. The jury was also instructed that, if they have "a reasonable doubt" as to whether the crime is first or second degree murder, they must return a verdict in the second degree. Joint Appendix, at 97 (CALJIC 8.71). They were given a similar instruction with regard to the distinction between murder and manslaughter. Joint Appendix, at 98 (CALJIC 8.72). In fact, the jurors were told, expressly, that the standard of proof was "beyond a reasonable doubt," at least six times in six different instructions. *See also*, Joint Appendix, at 118 (CALJIC 8.72 and CALJIC 8.80 and 8.81.3 as modified by the trial court). And this does not count how many other times they were given the corresponding phrase (in one form or another) that "if you [the jury] have a reasonable doubt" you must find the defendant not guilty, or guilty of the lesser crime,

etc. Under these circumstances, or anything like them, no juror would be confused as to what the applicable standard of proof was – that is, *beyond a reasonable doubt*.

CONCLUSION

For the reasons stated above, and in view of the potentially serious consequences for the criminal justice systems of California and of several of its sister states, amicus urges this Court to affirm the ruling of the California Supreme Court.

Respectfully submitted
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